

STATE OF NEW YORK: COUNTY OF SUFFOLK
SUFFOLK COUNTY BOARD OF ETHICS

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In the Matter of the Inquiry of [REDACTED]

ADVISORY OPINION
No. AO-2013-17

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NOTICE: THIS ADVISORY OPINION IS SUBJECT TO REVISION OR WITHDRAWAL. Applications requesting its modification, clarification, or withdrawal must be made in accordance with Suffolk County Board of Ethics rules unless an application for the revision or withdrawal of an advisory opinion is timely received, it shall become final. Nothing shall prohibit the Suffolk County Board of Ethics, on its own motion, from reconsidering, revising or withdrawing an advisory opinion at any time.

ADVISORY OPINION REQUEST

1. Can a violation of Suffolk County Code § 77-4 (B), “Prohibition of Dual Office-Holding”, be found prior to an elected official’s taking their oath of office?

GOVERNING AUTHORITY

2. The Laws of Suffolk County; Suffolk County Administrative Code XXX, Advisory Opinions, Suffolk County Code Chapter 77, Section 77-4(B), Public Officer’s Law Sections 4 and 10, and New York law.

PROCEDURAL HISTORY

3. This Advisory Opinion was requested 11/21/2013.
4. A standing vote was found on 12/5/2013.
5. The Board voted on this Advisory Opinion request on 12/11/2013.

INFORMATION PRESENTED TO THE BOARD

6. The Requestor, a newly elected Suffolk County Legislator, is currently employed as a Suffolk County [REDACTED]. (*Requestor’s Exhibit# 1*).
7. The Requestor is scheduled to retire from 30 years of service with the Suffolk County [REDACTED] on January 2, 2014 at 12:01am (*Requestor’s Exhibits# 2*).
8. The Requestor has received confirmation from the County Legislature that [REDACTED] will be

sworn in at an organizational meeting on January 2, 2014 at 11:00am and that payroll for ■ newly elected position will commence January 3, 2014, after ■ retirement is effective from the Suffolk County ■ (Requestor's Exhibits# 2).

OPINION AND ANALYSIS

9. In considering this inquiry, the Board employed the following three-step analysis to determine whether a violation of Section 77-4(B) would occur:

- a) Does the Requestor have standing to obtain an Advisory Opinion from the Suffolk County Board of Ethics;
- b) Is the Requestor seeking advice on proposed future conduct;
- c) Whether the Requestor's scheduled retirement from the Suffolk County ■ on January 2, 2013 at 12:01 a.m. will violate section 77-4(B) of the Suffolk County Code of Ethics?

STANDING

10. The Board determined that standing exists for this Advisory Opinion request due to the Requestor's position as a prospective public servant employed by the Suffolk County Legislature (*Suffolk County Administrative Code §A30-1, Suffolk County Code Chapter 77, §77-1*).

PROPOSED FUTURE CONDUCT

11. The Law States in Pertinent Part:

§ A30-3(B). ADVISORY OPINIONS:

Advisory opinions shall be issued only with respect to proposed future conduct or action by a public servant. A public servant whose conduct or action is the subject of an advisory opinion shall not be subject to penalties or sanctions by virtue of acting or failing to act due to reasonable reliance on the opinion, unless material facts were omitted or misstated in the request for an opinion. The Board may amend a previously issued advisory opinion after giving reasonable notice to the public servant that it is reconsidering its opinion.

12. The Board determined that as the Requestor has not retired yet or taken ■ oath of office, that the request is regarding proposed future conduct and is within the Board's jurisdiction.

POTENTIAL VIOLATION OF SECTION 77-4(B)

13. The Laws state in pertinent part:

I. Suffolk County Code § 77-4. Prohibition on dual office-holding; other provisions relating to political party officials

B. No elected official shall hold another paid position of employment with the County or a paid position of employment with any department, office, commission, board or agency of the United States of America, New York State, any town or village government, or public benefit corporation created under the provisions of New York State law. This provision shall not apply to an elected official who also holds a position as a teacher in a public school district or a professor at a public university or college.

II. New York State Public Officer's Law Section 10: Official oaths:

"Every officer *shall take and file the oath of office* required by law, and every judicial officer of the unified court system, in addition, shall file a copy of said oath in the office of court administration, *before he shall be entitled to enter upon the discharge of any of his official duties*". (*emphasis added*).

14. The Suffolk County Code provides in pertinent part that "[n]o elected official shall hold another paid position of employment with the County or a paid position of employment with any department, office, commission, board or agency of the United States of America, New York State, any town or village government, or public benefit corporation created under the provisions of New York State law." Suffolk County Code, § 77-4(B).

15. The Requestor was elected to the Suffolk County Legislature on November 5, 2013. [REDACTED] is scheduled to be sworn in to this office at an organizational meeting on January 2, 2014 at 11:00 a.m. At such time, the Requestor is expected to take an oath of office and commence the performance of the duties of the office.

16. The Requestor is currently a thirty (30) year employee with the Suffolk County [REDACTED], and [REDACTED] has scheduled to retire from such position on January 2, 2014 at 12:01 a.m.

17. At issue is whether the Requestor's planned retirement date from his employment with the Suffolk County [REDACTED] will cause [REDACTED] to be in violation of the prohibition in section 77-4(B) of the Suffolk County Code against an "elected official [holding] another paid position of employment with the County[.]" Thus, the issue is whether the Requestor is an "elected official" on January 1, 2014 prior to the time on January 2 at 12:01 a.m. when [REDACTED] plans to retire from [REDACTED] paid position

with the County [REDACTED] and take an oath of office for the County Legislature.¹

18. Although County Law provides that the term of an elective office shall commence on the first day of January next after his election, New York Public Officers Law §4 (McKinney 2001 & Supp. 2013), New York law requires that every officer take and file an oath of office “before he shall be entitled to enter upon the discharge of any of his official duties.” N.Y. Pub. Officers Law §10 (McKinney 2001 & Supp. 2013).

19. Moreover, courts in this State have held that an affirmative act is required by an elected official to “accept” a second office before the court will find that there has been an incompatibility between the two positions that is barred by common law or by a local statute, such as Section 77-4(B). Thus, Courts have required a showing that the elected official has accepted the second office, either by entering upon the performance of the duties of that office or that [REDACTED] has performed a less than official act such as the taking and filing of an oath of office. Sulzer v. Sohmer, 211 N.Y. 565 (1914); Held v. Hall, 191 Misc. 2d 427, 741 N.Y.S.2d 648 (Sup. Ct., Westchester Co. 2002); Fauci v. Lee, 38 Misc.2d 564, 237 N.Y.S.2d 469 (Sup. Ct., Broome Co. 1963)(*acceptance* of the second elective office is required before a court will find that there has been an incompatibility with another office); see also Smith v. Dillon, 267 A.D.39, 44 N.Y.S.2d 719 (3d Dep’t 1943)(appointee has to “accept” and qualify for second position before the Court will find that there has been any incompatibility between the offices).

20. Thus, although the Requestor’s *term of office* may begin on January 1, 2014, there can be no incompatibility of positions or violation of Section 77-4(B) until the Requestor accepts the Legislative position, either by entering upon the performance of official legislative duties or by taking the oath of office. Some positive showing of acceptance of the Legislative office must be made before the Requestor can be deemed an “elected official” pursuant to Section 77-4(B) and New York law.

21. As the Requestor has stated that [REDACTED] will not take and file an oath office until January 2,

¹ The Requestor has also reported that [REDACTED] will not be put on the County Legislative payroll until January 3, 2014, after [REDACTED] retirement from the County [REDACTED] has become effective, although this fact is not dispositive of whether Requestor will be an “elected official” holding another paid position with the County on January 1, 2014 prior to [REDACTED] planned retirement on January 2, 2014.

2014 at 11 a.m., *after* ■ has previously resigned ■ employment with the Suffolk County ■ on January 2 at 12:01 a.m., there can be no violation of Section 77-4(B), as long as the Requestor also refrains from any other affirmative act accepting the legislative office prior to 11 a.m. on the 2nd of January.

22. Currently, there is no local or State law which prevents the Requestor from refraining from accepting ■ legislative office for one day, until January 2 at 11 a.m. -- the one day being January 1, 2014, which is, in any event, a Federal holiday.

CONCLUSION

23. As set forth above, the Board finds that the Requestor's scheduled retirement from the Suffolk County ■, occurring at 12:01 a.m. on January 2, 2104 will not cause ■ to be in violation of Section 77-4(B)'s prohibition against an elected official holding another paid position of employment with the County.

24. Pursuant to Suffolk County Board of Ethics Resolution 004/2013 passed on January 30, 2013, the Requestor shall have 15 business days from the time this Advisory Opinion has been rendered (excluding Saturday, Sunday, or a legal holiday) to file a request for reconsideration supported by new material facts submitted to the Board.

25. The forgoing is the opinion of the Board.

Dated: Yaphank, New York
12/11/2013

Robin L. Long, Esq. – Chair